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No. 98-311

In The

Supreme Court of the United States

October Term, 1997

ISLANDER EAST RENTAL PROGRAM
and J. RAY RILEY,

Petitioners,

v.

LOWRY BARFIELD, ELIZABETH PARR, JAMES B. PENNY, LOCKWOOD SEEGAR, ISLANDER EAST ASSOCIATION, and BILL FERGUSON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

The Petition for Writ of Certiorari presents the question of whether Petitioners were denied their constitutional right to a jury trial by the trial court's refusal to permit Petitioners to present evidence of their legal claims' damages that arose after the court entered an injunction prohibiting use of a service mark. Respondents' Brief in Opposition obfuscates this question by attempting to reframe it as a question of whether the trial court abused its discretion in denying presentation to the jury of "evidence of alleged injunction violations".

I. RESPONDENTS' ARGUMENT THAT PETITIONERS WERE NOT ENTITLED TO JURY TRIAL FOR ALLEGED INJUNCTION VIOLATIONS IS IRRELEVANT TO QUESTION PRESENTED OF WHETHER PETITIONERS WERE ENTITLED TO JURY TRIAL OF DAMAGES ARISING UNDER THEIR LEGAL CLAIMS THAT WERE SUBMITTED TO THE JURY.

Petitioners' Second Amended Complaint, upon which this case was tried, was substantially the same as Petitioners' operative pleading *before the trial court entered an injunction* with the exception that two additional counts were added to the second amended complaint. New Count XI alleged wrongful issuance of an injunction, and new Count XII alleged violation of the injunction by Respondents' continued use of "the Islander East service mark, name or logo, or any confusingly suimilar [sic] service mark, name or logo, for condominium rental and related housekeeping services". The trial court's determination that Petitioners were not entitled to a jury

trial on whether the injunction had been violated is irrelevant to the question of whether Petitioners were entitled to present to the jury their monetary damages related to those of their original Counts I through X *that were legal claims*, even though those damages arose after the injunction issued.

Respondents correctly note that the proper manner for analyzing issues raised in a case to determine whether a particular action will resolve legal rights and therefore give rise to the right to a jury trial is the following: the action is compared to 18th century actions brought in the courts of England prior to the merger of courts of law and equity and, more importantly, the *remedy* sought is examined to determine whether it is legal or equitable in nature. *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990). The Seventh Amendment to the United States Constitution requires that each issue be treated separately. *Id.* at 570. When Petitioners' causes of action are analyzed under the *Terry* case, it will be seen that a fundamental remedy sought by Petitioners – monetary damages – was legal in nature under Petitioners' pled causes of action described below. *This is the very reason why the magistrate judge submitted interrogatories concerning these causes of action to the jury in the first instance.* These causes of action sounded in tort, and money damages were sought. Actions sounding in tort for damages to a person or property are generally considered to be actions at law. See *Ross v. Bernhard*, 396 U.S. 531, 533 (1970).

Predicated upon Petitioners' rental program having developed over seventeen years a valuable base of customers generating nearly $6,000,000 in revenues, having

entered into various agreements giving Petitioners' rental program the exclusive right to rent participants' condominium units, having paid for a laundry room facility on site, and having valuable assets, including reservations, customer lists and other confidential business information, Petitioners sought to recover their monetary damages. One theory of recovery, for example, was a cause of action for conversion of Petitioners' various properties.[1] Conversion unmistakably is an action of law. *Ross*, 396 U.S. at 533. As such, Petitioners should have been permitted to prove their damages arising out of conversion of their properties by Respondents, even though those damages arose after the trial court entered an injunction prohibiting use of a name.

Petitioners' damages for conversion of its properties were substantially unrelated to the independent question of whether Respondents had violated an injunction by using a mark or name forbidden by the injunction. The trial court concluded, incorrectly, that Petitioners' request

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[1] Other theories of recovery of monetary damages were for tortious interference by Respondents with business relationships among Petitioners and their customers, rental program participants and rental program employees; for common law conspiracy to misappropriate Petitioners' rental program assets and to violate the rights of Petitioners; for misappropriation of Petitioners' reservations, customer lists and confidential business information; and for a breach of Respondents' fiduciary obligations owed to Petitioners which arose under Texas statutory law relating to governance of condominiums. None of the damages that flow from these causes of action constitute damages that would arise out of mere misuse of a service mark or trade name in violation of an injunction.

for damages for conversion was, in Respondents' words, "a request for compensatory damages in civil contempt for violation of the injunction." See Respondents' Brief in Opposition, page 2.

II. RESPONDENTS CONCEDE FIFTH CIRCUIT DENIED PETITIONERS' REQUEST FOR REHEARING ON SAME QUESTIONS RAISED IN PETITION FOR WRIT OF CERTIORARI BUT INCONSISTENTLY ARGUE THAT FIFTH CIRCUIT DID NOT DECIDE IMPORTANT FEDERAL QUESTION IN WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

At page 3 of the Brief in Opposition Respondents concede that Petitioners raise the same points in their Petition for Writ of Certiorari which Petitioners raised in their request for rehearing to the Fifth Circuit, and that the Fifth Circuit denied the request. Respondents then inconsistently argue at page 7 of their Brief in Opposition that "because Petitioners misstate the question presented, they cannot tenably demonstrate that the Court of Appeals 'has decided an important federal question in a way that conflicts with relevant decisions of this Court.' " By denying Petitioners' request for rehearing, the Fifth Circuit decided adversely to Petitioners the question presented to this Court – are Petitioners entitled to prove that a violation of their legal rights proximately caused damages arising after an injunction was issued prohibiting use of a name? The Fifth Circuit's March 24, 1998, opinion decided adversely to Petitioners the reframed question suggested by Respondents. Petitioners seek a

writ of certiorari concerning the former question, not the Respondents' latter question.

III. THIS CASE IS NOT SO "COMPLICATINGLY FACT-BOUND" THAT THIS COURT SHOULD NOT GRANT WRIT OF CERTIORARI.

Respondents argue that this Court should deny the Petition for Writ of Certiorari because this case is "complicatingly fact-bound". Petitioners respectfully disagree with this argument which, essentially, disregards the considerations set forth in SUP. CT. R. 10 governing review of petitions on writ of certiorari, particularly one that raises a serious constitutional question. The facts of this case are fairly simple and straightforward. Petitioners operated a rental program business for seventeen years that was prosperous when Respondents decided to take the business over. Are Petitioners entitled to monetary damages arising from Respondents' actions? That the parties disagreed over the ownership of a name, the basis for federal jurisdiction, does not transform the case into one "complicatingly fact-bound".

CONCLUSION

In conclusion, the question formulated by Respondents in their Brief in Opposition is irrelevant to the proper questions stated in Petitioners' Petition for Writ of Certiorari, which are:

> 1. In a civil action involving both legal and equitable claims, whether the constitutional right to trial by jury is violated by an order of

the trial court precluding the plaintiffs from presenting to the jury evidence of damages necessary to prove their legal claims tried to the jury when the damages arose after the trial court first exercised its equity jurisdiction?

2. In a civil action involving both legal and equitable claims, whether the constitutional right to due process of law is violated by an order of the trial court precluding the plaintiffs from presenting to the jury evidence of damages necessary to prove their legal claims tried to the jury when the damages arose after the trial court first exercised its equity jurisdiction?

Respectfully submitted,

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